

JURISIDCTION & AUTHORITIES OF AN IMMIGRATION JUDGE



OFFICE OF THE CHIEF IMMIGRATION JUDGE
ACIJ JACK H. WEIL
JANUARY 29, 2018

Jurisdiction Vests & Proceedings Commence

U. S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

(b) (6)

In the Matter of:

(b) (6)

Respondent:

currently residing at:

SERVICE PROCESSING CENTER, ICE 1115 NORTH IMPERIAL AVENUE
EL CENTRO CALIFORNIA 92243

(760) 336-4600

(Number, street, city state and ZIP code)

(Area code and phone number)

- ☐ 1. You are an arriving alien.
☒ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

Department of Justice
Executive Office For
Immigration Review

SEP 23 2005

The Service alleges that you:

U.S. Immigration Court
El Centro, California
Received By: _____

- 1) You are not a citizen or national of the United States;
- 2) You are a native of MEXICO and a citizen of MEXICO;
- 3) You arrived in the United States at or near Calexico, California, on or about September 16, 2005;
- 4) You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

112(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

"TO BE CALENDARED AND NOTICE PROVIDED BY THE OFFICE OF THE IMMIGRATION JUDGE." 1115 N. Imperial Ave., El Centro, CA 92243

(Complete Address of Immigration Court, Including Room Number, if any)

on a date to be set at a time to be set to show why you should not be removed from the United States based on the charge(s) set forth above.

EXHIBIT#
DATE
I.D. ONLY ADMITTED

(b) (7)(C)

(Signature and Title of Issuing Officer)

Calexico, California

(City and State)

Date: September 16, 2005

See reverse for important information

Form I-862 (Rev. 3/22/99)N

Notice to Appear



In removal proceedings under section 240 of the Immigration and Nationality Act

(b) (6)

In the Matter of:

Respondent: (b) (6)

IN I&NS CUSTODY

(Number, street, city state and ZIP code)

currently residing at:

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

JAN 27 2003

FILED WITH
IMMIGRATION COURT
SAN DIEGO, CA

- ☐ 1. You are an arriving alien.
☒ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

- 1) You are not a citizen or national of the United States;
- 2) You are a native of CHINA, PEOPLES REPUBLIC OF and a citizen of CHINA, PEOPLES REPUBLIC OF;
- 3) You arrived in the United States at or near Tecate, California, on or about January 22, 2003;
- 4) You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: _____
a place to be set

on a date to be set _____ at a time to be set _____ to show why (b) (7)(C) _____ the
(Date) (Time) charge(s) set forth above.

Date: January 22, 2003

ASSISTANT CHIEF PATROL AGENT

(Signature and Title of Issuing Officer)

San Diego, California

(City and State)

See reverse for important information

Immigration Judge Defined: INA 101(b)(4) & 8 CFR 1003.10

An attorney whom the [REDACTED] Attorney General appoints as an administrative judge within the Office of the Chief Immigration Judge to conduct specified classes of proceedings, including hearings under section 240 of the INA and other assigned proceedings.

Must meet requirements of other Departmental attorneys [REDACTED]



Immigration Judge Defined: INA 101(b)(4) & 8 CFR 1003.10

Immigration Judges shall act as
the Attorney General's delegates in
the cases that come before them.



Source of Powers & Authority

The powers and authority of the office are limited to those which:

1. have been designated to the Attorney General by statute (as interpreted by case law) and
2. then have been assigned to the Immigration Judges by statute or regulation.



Judicial Independence as it Pertains to the Immigration Judge

In deciding the individual cases before them, and subject to applicable governing standards, Immigration Judges shall exercise their independent judgment and discretion...

What if the Attorney General does not agree with a decision?



Powers & Authorities: INA 240(c)(1)(A) & 8 CFR 1240.1(a)(1)(i)-(ii)

In any removal proceeding, the Immigration Judge shall have the authority to:

- Determine removability *based only on evidence produced at the hearing (or administratively noticable facts)*
- Make decisions, including orders of removal, as per INA 240(c)(1)(a)
- Determine listed applications for relief



Sources of Authority: INA 240(b)(1) & 8 CFR 1240.1(c)

The Immigration Judge [REDACTED] all:

- Administer oaths
- Receive (material & relevant) evidence
- Interrogate (?), examine, and cross examine the alien and any witnesses. [REDACTED]



Duty to Develop the Record & Associated Powers

[REDACTED]

[REDACTED]

The Immigration Judge is expected to develop the record (including, but not limited to, identifying available forms of relief).

How do I do this and remain an impartial adjudicator?

[REDACTED]



Duty to Develop the Record & Associated Powers

The Immigration Judge [REDACTED] has the authority to:

- Question witnesses directly
- Request that certain witnesses be presented
- Request submission of certain kinds of documents or corroborating evidence.

What do I do if a party does not comply?
[REDACTED]



Subpoena power

██████████
██████████

The Immigration Judge may issue subpoenas for the attendance of witnesses and presentation of evidence.

How do we handle failure to comply? See, 8 CFR 1003.35(b)(6)
██████████



Associated Powers of an Immigration Judge

- Rule on objections and issues of admissibility regarding documentary evidence and testimony
- Accept witnesses as experts
- Accept proffers of evidence



Establish Timelines: 8 CFR 1003.31(c) & 1003.29

An Immigration Judge may:

- Set reasonable deadlines for submission of evidence
- Extend deadlines
- Continue proceedings for “**good cause**”



Establish Timelines: 8 CFR 1240(c)

The Immigration Judge shall...
otherwise regulate the course of
the hearing.

In what order shall I receive and
consider evidence?

Should I adjudicate an application
for relief if I am not going to
sustain the charge(s)?



Powers & Authorities:

8 CFR 1240.1(a)(1)(iii)

In any [REDACTED] proceeding, the Immigration Judge shall have the authority to:

- Order withholding of removal pursuant to INA 241(b)(3) & the Convention Against Torture

In such cases a removal order is entered and then [REDACTED] or deferred.

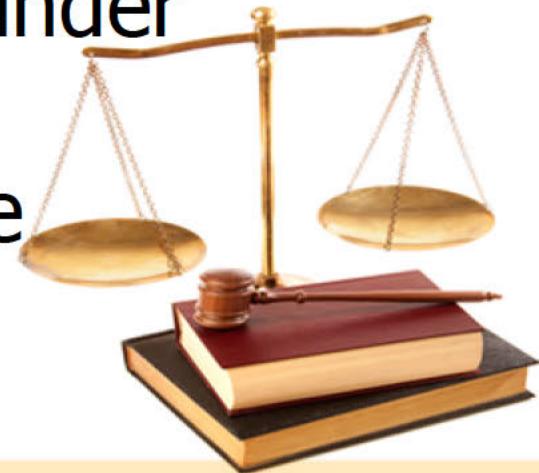


General Powers & Authorities: 8 CFR 1003.10 & 8 CFR 1240.1(a)(1)(iv)

[REDACTED]

In ~~deciding~~ the individual cases before them, and subject to applicable governing standards, Immigration Judges ... may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.

[REDACTED]



Civil Contempt Statutorily Authorized but no Implementing Regulations

The Immigration Judge shall have authority (under regulations prescribed by the AG) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority.

How do we maintain control in absence of contempt powers?



Power to Certify Removal Decision: 8 CFR 1240(a)(1)(iv)(2)

[REDACTED]

[REDACTED]

The Immigration Judge may certify decision to BIA when it involves an unusually complex or novel issue of law or fact.

[REDACTED]



Power to Allow Withdraw of Application for Admission: 8 CFR 1240(d)

An Immigration Judge may allow only an arriving alien to withdraw an application for admission.

Qualifiers:

- After inadmissibility resolve, ordinarily with DHS consent
- Intent & means to depart & in interest of justice



Authority to Reopen Proceedings: INA 240(c)(7)

[REDACTED]

[REDACTED]

An Immigration Judge may reopen the record upon motion of a party (subject to time and/or numerical rules) or sua sponte at any time.

[REDACTED]



Authority to Reconsider Proceedings: INA 240(c)(7)

[REDACTED]

[REDACTED]

An Immigration Judge may reconsider any decision (subject to time and/or numerical rules) or sua sponte at any time.
if there was an error of law or fact in the prior proceeding.

[REDACTED]



Custody & Bond Authority: INA 236

[REDACTED]

[REDACTED]

An Immigration Judge, except as provided in INA 236(c), may re-determine a DHS decision to continue to detain an alien or to release the alien on bond or with a conditional parole.

[REDACTED]



Adjudications Beyond Authority of an Immigration Judge

- I-130 (Petition for Alien Relative)
- I-140 (Petition for Alien Worker)
- N-600 (Application for Certificate of Citizenship)
- N-400 (Application for Naturalization)
- I-360 SIJ Status Application
- Initial I-589 of a UAC



Handling Adjudications During Proceedings Beyond IJ Authority

Although the Immigration Judge does not have authority to adjudicate certain applications, the judge may need to examine whether the application is prima facie approvable to determine whether “good cause” exists to grant a continuance for adjudication.



U.S. Citizenship: A Legal & Jurisdictional Issue

Jurisdiction in the ex ██████████ to order deportation only exists if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact.

This holding extends to authority to detain a respondent as well.

Ng Fung Ho v. White,
259 U.S. 276, 284 (1922) ██████████



Powers and Authorities of an Immigration Judge

I. General Overview

- a. An Immigration Judge is defined in INA section 101(b)(4), as “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240.” In other words, an Immigration Judge is a Department of Justice attorney who acts under the authority of the Attorney General. The powers and authority of the office are limited to those which have been designated to the Attorney General by statute (as interpreted by case-law) and then have been assigned to Immigration Judges by statute or regulation.
- b. **Practice tip:** Just because a statute says authority is granted to the “Attorney General” does not mean that it actually is! Some sections of the INA and some regulations were not updated after the passage of the Homeland Security Act of 2002, which created the Department of Homeland Security (DHS). Prior to that time, the Department of Justice’s Immigration and Naturalization Service served many of the functions which today are within the auspices of the DHS. Some statutes and regulations still indicate that certain powers and authorities are within the purview of the “Attorney General” that are actually within the sole purview of the Secretary of Homeland Security.
 - i. More information on the powers and authorities delegated to the Secretary of Homeland Security and the Attorney General is available in INA section 103. In general, the authority of the Attorney General includes “such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.”
- c. This outline provides only a general overview of the powers and authorities of an Immigration Judge.

II. Sources of Authority

- a. INA section 240(b)(1)
 - i. “The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.”

This is a general summary prepared solely for instructional purposes and does not constitute a complete statement of the law. This document should not be relied on as legal advice. Any individual seeking information regarding their legal rights should consult with an experienced immigration attorney.

Powers and Authorities of an Immigration Judge

- ii. In order to fulfill these obligations, an Immigration Judge also has associated powers. For instance, an Immigration Judge may:
 - 1. Rule on objections and issues of admissibility regarding documentary evidence and testimony;
 - 2. Accept witnesses as experts;
 - 3. Accept proffers of evidence
 - iii. This section sets forth the authority of the Immigration Judge in removal proceedings. However, these powers are also available in exclusion, deportation, and asylum- or withholding-only proceedings.
 - iv. **Practice tip:** Unlike judges in most other systems, an Immigration Judge is expected to be an active participant in developing the record. The Immigration Judge may need to solicit certain kinds of evidence in order to complete the record. To that end, an Immigration Judge also has the power to:
 - 1. Question witnesses directly;
 - 2. Request that certain witnesses be presented for testimony;
 - 3. Request the submission of certain kinds of documentary or corroborative evidence
 - v. An Immigration Judge may set reasonable deadlines for the submission of evidence, may extend deadlines, and may continue proceedings for “good cause” (which may include the filing of additional evidence or awaiting resolution of collateral issues). *See* 8 C.F.R. §§ 1003.31(c), 1003.29
 - vi. At present, there are no final regulations authorizing an Immigration Judge to issue contempt rulings with sanctions. Work on these regulations remains pending with the agency. In the event that an individual or entity fails to comply with a subpoena, an Immigration Judge may contact the United States Attorney for the district in which the subpoena was issued to report such neglect or refusal to the United States District Court and seek an enforcement order from the District Court. *See* 8 C.F.R. § 1003.35(b)(6) for more information regarding this procedure.
 - vii. *See also* 8 C.F.R. §§ 1003.10 and 1240.1 for more information on the general powers and authorities of an Immigration Judge
- b. INA section 240(c)(1)(A)
- i. An Immigration Judge “shall decide whether an alien is removable from the United States [...] based only on the evidence produced at the hearing.”
 - ii. Ordinarily, a decision regarding removability must be based solely on evidence presented by the parties.
 - iii. **Practice tip:** An Immigration Judge may, in some cases, take *administrative notice* of the contents of easily-accessible public records or

Powers and Authorities of an Immigration Judge

commonly known facts. Administrative notice is the means by which agencies make factual findings without benefit of the adversarial presentation of evidence. *See Matter of R-R-*, 20 I&N Dec. 547, 555 (BIA 1992); *see also* 8 C.F.R. § 1003.1(d)(3)(iv). Administrative notice is best used as a time-saving device with the consent of both parties, and should not be used without providing the parties an opportunity to object or respond to the evidence.

EXAMPLE

During an asylum proceeding, an Immigration Judge asks the parties if they wish her to take administrative notice of the contents of the most recent country conditions reports from the Department of State. The parties do not object, and the Immigration Judge is free to independently obtain the reports and consider their contents as if they had been entered into the record by the parties.

Later, while assisting with a subsequent written decision, the Immigration Judge's judicial law clerk discovers an on-point report created by the UNHCR. It probably would be inappropriate to take administrative notice of the contents of that report without prior notice to the parties and an opportunity for them to object.

- c. INA section 240(c)(7)
 - i. An Immigration Judge may reopen the record to permit additional evidence. The Immigration Judge may adjudicate motions to reopen filed by the parties, which are ordinarily subject to time and/or numerical limitations. Alternatively, 8 C.F.R. § 1003.23(b)(1) permits an Immigration Judge to reopen proceedings sua sponte "at any time."
 - ii. An Immigration Judge may also reconsider any decision he or she entered in removal proceedings if there was an error of law or fact in the prior decision. This may be upon the motion of a party, in which case there are again time and numerical limitations, or it may be sua sponte.

Powers and Authorities of an Immigration Judge

- d. INA section 236
 - i. An Immigration Judge “[e]xcept as provided in subsection (c) of this section” may re-determine a DHS decision to “continue to detain” an alien or to release the alien on bond or with a conditional parole.
 - ii. More information regarding the precise powers and authorities in bond proceedings is available in your bond training.
 - iii. **Practice tip:** An Immigration Judge cannot order an alien released on his or her own recognizance; there must be some condition on the parole. However, the Immigration Judge has some discretion with respect to the particular conditions imposed on the alien.
 - iv. *See also* 8 C.F.R. § 1003.19
- e. 8 C.F.R. § 1240.1
 - i. This regulation explicitly identifies a number of powers held by Immigration Judges. These include, for example:
 - 1. The authority to enter orders of removal;
 - 2. The authority to adjudicate certain forms of relief applications, including:
 - asylum applications submitted under INA section 208;
 - certain waiver applications submitted under INA sections 212 or 237;
 - cancellation of removal applications under section 240A;
 - voluntary departure applications under section 240B;
 - adjustment of status under 245;
 - records of admission for permanent resident under 249;
 - and NACARA relief under section 202 of Pub. Law No. 105-100
 - 3. The power to withhold removal under section 241(a)(5) of the Act or under the Convention Against Torture regulations is listed separately, because these are not considered forms of relief from removal. Remember a removal order is entered in such cases, and then removal is withheld or deferred.
 - 4. An Immigration Judge may also permit an arriving alien to withdrawn his or her application for admission, if the alien has the means and intent to immediately depart and if permitting the withdrawal would be in the “interests of justice.” For more information, see 8 C.F.R. § 1240.1(d)

Powers and Authorities of an Immigration Judge

EXAMPLE

An Immigration Judge does not have authority to adjudicate family-based visa petitions.

However, an Immigration Judge does have the authority to determine whether good cause is shown for a continuance, including a continuance to await adjudication of a family-based visa petition. Per the Board decision in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), one of the factors for determining whether there is “good cause” for such a continuance is “whether the underlying visa petition is prima facie approvable.”

Therefore, an Immigration Judge may need to examine the alien’s submission to Citizenship and Immigration Services, but only for the purposes of adjudicating the continuance and not to make legal conclusions regarding the substantive merits of the visa petition.

- ii. Finally, 8 C.F.R. § 1240.1(a)(4) permits an Immigration Judge to “take any other action consistent with applicable law and regulations as may be appropriate.”